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BRIEF AND APPENDIX FOR APPELLANTS

Supreme Court of the United States

OCTOBER TERM, 1948

No. 297

JOHN M. DANIEL, AS ATTORNEY GENERAL OF SOUTH CAROLINA, L. GEORGE BENJAMIN, AS INSURANCE COMMISSIONER OF SOUTH CAROLINA, AND B. B. BROCKMAN, AS SHERIFF OF SPARTANBURG COUNTY, APPELLANTS,

versus

FAMILY SECURITY LIFE INSURANCE COMPANY, J. GORDON FLOYD, W. RUSSELL FLOYD AND WILLIAM E. LANFORD, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

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FAMILY SECURITY LIFE INSURANCE COMPANY, J. GORDON FLOYD, W. RUSSELL FLOYD AND WILLIAM E. LANFORD, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

The Appellants, who are State officials charged with the enforcement of the questioned statute, seek review of a District Court Judgment (R. 167) granting an injunction permanently restraining the enforcement of the statute.

OPINION BELOW

The opinion and dissenting opinion in the District Court for the Eastern District of South Carolina are reported at 79 F. Supp. 62.

JURISDICTION

The judgment of the three-Judge District Court was entered on August 12, 1948. The petition for appeal was

filed August 27, 1948. Probable jurisdiction was noted October 25, 1948 (R. 183). The jurisdiction of this Court rests on Section 266 of the Judicial Code (28 USCA 380, new 28 USCA 1253; 2284).

QUESTION PRESENTED

Does the South Carolina statute prohibiting domestic insurance companies which are owned, managed and directed by South Carolina undertakers from writing life insurance through undertakers as agents, with premiums payable at undertaking parlors and benefits payable through undertakers, contravene the due process or equal protection clauses of the Fourteenth Amendment?

STATUTES INVOLVED

The South Carolina statute under attack, 1948 Acts No. 787, 45 Statutes 1947, is set out in full in the Appendix, and in the majority opinion (R. 147).

Incidentally involved are the South Carolina statutes prohibiting the payment of life insurance benefits in merchandise or services. 36 Stat. (1929) 234, 1942 Code 7984, 1947 Acts 350. Appendix 34

Constitutional and statutory provisions making corporate charters subject to repeal or amendment at the pleasure of the Legislature are found in Article IX, Sect. 2, 17, of the Constitution of 1895, and in Section 7676 of the Code of 1942. Appendix 36

SPECIFICATION OF ERRORS INTENDED TO BE URGED

The United States District Court for the Eastern District of South Carolina, Columbia Division, erred:

1. In holding that the South Carolina statute (45 Stat. 1947) making it unlawful for life insurance companies to own and operate funeral homes and for undertakers to act as life insurance agents is arbitrary and discriminative and therefore in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

2. In failing to hold that the South Carolina statute of 14 April 1948 (45 Stat. 1947) was a proper exercise of the police power of the State in the regulation of insurance companies, insurance agents and morticians, each being engaged in a business or occupation clothed with a public interest.

3. In holding that the validity of the entire statute was in issue, whereas the correct ruling should have been that the issue was whether the statute deprived the plaintiffs of equal protection or due process.

4. In holding that the burden of showing that the challenged state legislation is valid is upon the defendant officers of the State when it should have held that the plaintiffs have the burden of showing beyond a reasonable doubt that the statute violates the Federal Constitution.

5. In holding (Findings 37-41, R. 163-165) that the fact that the passage of the challenged legislation was advocated before the Legislature by representatives of undertaking establishments and insurance companies was pertinent on the issue of constitutionality and in failing to hold that under our system of government every citizen has a right to appear before legislative committees in support of or in opposition to proposed legislation.

6. In invading the field of legitimate state legislation and substituting the judgment of a Federal Court on the

wisdom of the challenged legislation for the judgment of the State Legislature to whom it had been entrusted under our Federal system.

7. In permanently enjoining state officials from enforcing valid state legislation.

STATEMENT

This is an action by a domestic insurance company, its controlling stockholders and one of its agents, to enjoin the enforcement of a state statute (45 Stat. 1947) introduced in the South Carolina Legislature as Bill 1141 on February 3, 1948, and enacted into law by the Governor's approval on April 14, 1948. (Appendix 3, 4.)

In effect the Act divorces the businesses of life insurance and undertaking from each other by making it unlawful to have interlocking control of the two businesses or to have persons connected with one of these businesses operating or being agent for the other business. The Act was passed by large majorities in both houses of the South Carolina Legislature after full public hearings by the Banking and Insurance Committees of the Legislature. At these hearings both proponents and opponents of the measure, including the appellee J. Gordon Floyd and other officers of the appellee corporation, were present and testified (R. 84, 94, 104, 117, 125.)

The Family Security Life Insurance Company, Appellee, is a South Carolina insurance corporation, chartered in 1936 as the Pee Dee Life Insurance Company with an authorized capital of $50,000.00 and a paid-in capital of $500.00. In the insolvency proceedings involving this company its charter was sold and in 1941 became the property of the Appellees, J. Gordon Floyd and W. Russell Floyd. The corporate name was changed to Future Security Life In-

surance Company in 1941 and on June 13, 1947, to its present name. During 1947 its authorized capital was increased from $5,000.00 to $50,000.00, its paid-in capital from $500.00 to $11,860.00 (R. 44). At the time of trial (May 19, 1948) its paid-in capital was $16,000.00, its paid-in surplus $64,000.00, making the aggregate capital account $80,000.00. Of this amount J. Gordon Floyd and W. Russell Floyd, Appellees, each owned $13,000.00, and J. E. Floyd Mortuary, Inc., which is owned by the two Floyds, owned $23,000.00. (R. 45.)

The Appellee Insurance Company has thirty-four stockholders, all of whom, except one, manage, supervise, operate or are employed by mortuaries or undertaking establishments. The individual appellees are stockholders. Four of the five directors and the President of the insurance company are either owners, managers, supervisors or operators of mortuaries or undertaking establishments. Each of the individual Appellees is a director and J. Gordon Floyd is president of the corporation. The two Floyds together with their mortuary own the controlling interest in the insurance company and fifty-one of the sixty-eight agents licensed to sell the company's policies are owners or employees of mortuaries. (R. 45.)

Until February 3, 1948, the date of the introduction of House Bill 1141, which became law on April 14, 1948 (45 Stat. 1947), the Family Security Life Insurance Company had been inactive. Immediately after the Bill was introduced Family Security pressed the sale of "Burial Insurance" as is shown by a comparison of the insurance in force on the several dates during the progress of the legislation. (R. 45.)

Date	*Policies in Force*	*Amount Insurance in Force*
1947		
Dec. 31	2	$ 500.00
1948		
Feb. 3 (date introduction Bill)	2	500.00
Feb. 17 (date favorable report House Committee)		50,000.00
Apr. 10 (Passage by Senate)	1,671	338,750.00
Apr. 14 Bill became law by Governor's Approval.		
Apr. 17 (Date Federal Injunction)	1,484	453,500.00
May 8	2,824	838,375.00

The method of doing business is illustrated by the policy and jacket issued by J. A. Bass who is the owner of the Bass Funeral Home of Rock Hill, S. C., and a similar establishment at Fort Mill, S. C., which he opened about March 1, 1948. He is the agent of the Family Security Life Insurance Company and sent out over his signature advertising material which is shown in the record. (R.46). He wrote and the Family Security Life Insurance Company issued on April 1, 1948, the latter's policy No. 1091-1 to Nancy Ann Wentz of Rock Hill, S. C., whose age is sixty-seven years, providing for monthly premiums of $1.57 and insurance in the amount of $125.00, delivering the policy in a jacket advertising the Bass Funeral Home. (R. 37, 46.)

The Appellee Company names mortuary owners and employees as agents, solicits business through them, collects the premiums at the mortuary home and sends the matured policy proceeds to the undertaker-agent for delivery to the insured's beneficiary. This is clearly forecast by the terms of the policy, the language of the jacket and of the advertising matter, and established by the appellants' supporting affidavits. (R. 18A-D, 23, 24, 26, 27, 29, 37.)

Under the Facility of Payment Clause in the policies the proceeds may be payable to an undertaker. One of the purposes of the plan was to "channel" the insurance pro-

ceeds to the undertaker who wrote the business, thus obtaining more business and more profits for that undertaker. Another purpose is to keep the returning service men from competing, "freezing" the business of established undertakers who become stockholders of Family Security. In other states where similar plans have operated, monopoly conditions in favor of the undertakers who join in the plan have arisen. (R. 23, 25, 28, 30.) These effects were presented to the Committees of the South Carolina Legislature. (R. 84-87.)

When the Insurance Laws of South Carolina were revised in 1947 the appellee J. Gordon Floyd was instrumental in obtaining the incorporation into the new Insurance Code of Section 65 (Acts of 1947, page 350) prohibiting the payment of life insurance benefits in funeral services. (R. 107.) However, when the 1948 Legislature enacted a statute prohibiting the indirect accomplishment of the same result, he and his insurance company brought this action to restrain its enforcement.

Two members of the 3-Judge District Court held that the statute violated the plaintiffs' rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The Court did not hold the legislation invalid under the Privileges and Immunities Clause or under the Contract Clause. The dissenting opinion of Circuit Judge Dobie held that the State statute was a proper exercise of its legislative power and not in violation of any Federal Constitutional right of the plaintiffs.

SUMMARY OF ARGUMENT

Where a state law is challenged in a Federal District Court as in contravention of the Fourteenth Amendment, the Court may not strike down the statute unless it is con-

vinced beyond a reasonable doubt that the complainants are deprived of due process or equal protection.

In passing upon the constitutional issue it is the Court's duty to lay the statute beside the Constitution and if it finds that the statute does not violate the plaintiffs' rights under the Amendment its function is complete. It has no concern with the wisdom of the law, it matters not who advocated the passage of the legislation.

South Carolina, having reserved the right to alter or amend the charters of its domestic corporations, may restrict their corporate activity without depriving the company of due process or equal protection. Since there is a substantial public interest in life insurance and in funeral homes, the State may regulate each of these businesses and may divorce the one from the other.

Where for many years the state has, without challenge, forbidden insurance companies to pay matured life policies in funeral services, the state may, without violating Federal Constitutional restrictions, prohibit the evasion of this statute under a scheme whereby the insurance is written by undertakers and payable in cash at the funeral parlor. Such a statute is not arbitrary and is not discriminatory merely because only one insurance company violated it.

A South Carolina statute which prohibits domestic life insurance companies which are owned, managed and controlled by morticians, from writing burial insurance through undertakers as agents, with premiums payable at funeral homes and benefits through undertakers, does not deprive either the insurance companies or their undertaker stockholders and agents of equal protection or due process within the meaning of the Fourteenth Amendment.

ARGUMENT

I.

Presumption of Constitutionality

This Court is passing upon the validity of a State statute which has not been construed by the State Supreme Court; it must therefore indulge in every presumption of constitutionality and construe the statute in any way which its language permits in order to sustain its validity.

> The Supreme Court of the United States will, in case a state statute is susceptible of a construction which will render it constitutional, resolve all doubt in favor of its constitutionality, in the absence of any construction of the statute by the state courts, for there is a presumption that a state statute will be so construed by the state courts as to uphold it. Furthermore, in the absence of a construction of a statute by a state court the Supreme Court of the United States, unless obliged to do otherwise, should not adopt a construction which might render the statute of doubtful validity, but should await a determination of the matter by the state court.
>
> 11 Am. Jur., Const. Law, Sec. 109, page 746.

Accord: *Toombs v. Citizens Bk.*, 281 U. S. 643; *South Utah Mines v. Beaver Co.*, 262 U. S. 325; *Douglas v. N. Y., N. H. & H. R. R. Co.*, 279 U. S. 377; *Mallinckrodt Chem. Wks. v. Missouri*, 238 U. S. 41; *Ariz. Copper Co. v. Hammer*, 250 U. S. 400; *Stephenson v. Binford*, 287 U. S. 251.

All doubt should be resolved in favor of the constitutionality of the statute. *Davies v. Beadles*, 321 U. S. 144; *Alabama v. McAliley*, 325 U. S. 450. The validity of a statute is to be determined from its general purpose and its sufficiency to accomplish the end desired, not from its ef-

fect in a particular case. 11 Am. Jur., Const. Law, Sec. 102, page 737. Cf. *SEC v. Joiner*, 320 U. S. 344.

A Court cannot inquire into the wisdom of legislation or the motives or intention of the Legislature which enacted a particular statute. *LaTourette v. McMaster*, 248 U. S. 465; *Queenside Realty Co. v. Saul*, 328 U. S. 80; *Nebbia v. N. Y.*, 291 U. S. 502, 11 Am. Jur., Const. Law, Sec. 141, page 818.

A careful reading of the majority opinion of the District Court reveals that the Court did not give full play to this presumption but in effect placed upon the state the burden of proving the constitutionality of the statute (R. 139):

> Their argument is silent of any reasonable basis for this limitation upon the right of employment by a citizen. There is nothing to show that the interest of the public generally as distinguished from other industrial insurance companies, requires such interference.

Yet in the same breath the Court makes the somewhat contradictory statement that "in their arguments they attempted to give some coloring of reason to this arbitrary legislation." (R. 140.)

The District Court even weighed the motives behind the advocacy of this legislation (R. 137):

> As the business of the plaintiff company increased rapidly its competitors became active. At meetings of agents of the competing insurance companies, pressure for legislation to destroy plaintiff company and to proscribe its agents was agreed upon. Division developed too among the morticians themselves and some of them joined with the competing insurance companies in promoting special legislation intended to destroy plaintiff company in its business. It seems obvi-

ous from the record that this legislation had its genesis in the desire of the existing insurance companies to eliminate the plaintiff company as a competitor. As a result of this pressure, the Legislature of South Carolina enacted and the Governor approved on April 14, 1948, the challenged statute.

The question before the Court below was, and the sole question before this Court is, whether the challenged legislation as applied to these Appellees, is a valid exercise of the police power of the state. The question of what pressure groups, if any, lobbied the Bill through, whether proper or improper motives actuated them, and whether the end result is wise or unwise are questions for the Legislature, not for the Courts.

II

The businesses of insurance and undertaking are subject to state regulation; therefore the relationship between them is subject to regulation.

A. The public interest in the business of insurance requires complete control and regulation by the State.

The right of the Legislature to regulate and control under the police power professions or occupations of a public and *quasi*-public nature is fully recognized. *Coppage v. Kansas*, 236 U. S. 1; *Osborn v. Oslin*, 310 U. S. 53; *Prudential v. Benjamin*, 328 U. S. 408; *U. S. v. S. E. Underwriters*, 322 U. S. 533; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389; *O'Gorman v. Hartford*, 282 U. S. 51; *Orient Ins. Co. v. Daggs*, 172 U. S. 557; *Merchants Ins. Co. v. Swart*, 267 U. S. 126; *National Ins. Co. v. Wanberg*, 260 U. S. 71; *Holman v. Springfield*, 311 U. S. 606.

It is not our province to measure the social advantage to Virginia of regulating the conduct of insurance companies within her borders in so far as it affects

Virginia risks. Government has always had a special relation to insurance. The ways of safeguarding against the untoward manifestation of nature and other vicissitudes of life have long been withdrawn from the benefits and caprices of free competition. The state may fix insurance rates, *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 58 L.Ed. 1011, 34 S.Ct. 612, LRA 1915-C, 1189; it may regulate the compensation of agents, *O'Gorman & Young v. Hartford F. Ins. Co.*, 282 U.S. 251, 75 L.Ed. 324, 51 S.Ct. 130, 72 ALR 1163; it may curtail drastically the area of free contract, *National Union F. Ins. Co. v. Wanberg*, 260 U.S. 71, 67 L.Ed. 136, 43 S.Ct. 32. States have controlled the expenses of insurance companies, N. Y. Ins. Law, Consolidated Laws of N. Y. Chap. 28, Sec. 244, and Wisconsin Statutes, Section 201.21; and see report of Joint (Armstrong) Ins. Investigation Committee (N. Y.), pages 403-418 (1906). They have also promoted insurance through savings banks; see Berman, The Mass. System of Savings Banks Life Insurance, Bulletin No. 615, U. S. Bureau of Labor Statistics, and New York Laws of 1938, Chap. 471. In the light of these exertions of state power it does not seem possible to doubt that the state could, if it chose, go into the insurance business just as it can operate warehouses, flour mills and other business ventures, *Green v. Frazier*, 253 U. S. 233, 64 L. Ed. 878, 40 S. Ct. 499, or might take "the whole business of banking under its control": *Noble State Bk. v. Haskell*, 219 U. S. 104, 112, 55 L. Ed. 112, 115, 31 S. Ct. 186, 32 L. R. A., N. S., 1062, Ann. Cases 1912-A, 487. If the state as to local risks could thus preempt the field of insurance for itself it may stay its intervention short of such a drastic step by insisting that its own residents shall have a share in devising and safeguarding protection against its local hazards. *LaTourette v. McMaster*, 244 U. S. 465, 61 L. Ed. 262, 37 S. Ct. 160. All these are questions of policy not for us to judge, for it can never be emphasized too much that one's opinion as to the wisdom

of law must be wholly excluded when one is doing one's judicial duty. The limit of our inquiry is reached when we conclude that Virginia has exerted its powers as to matters within the bounds of her control.

Osborn v. Ozlin, supra.

The Congress of the United States has specifically recognized this public interest in the insurance business by the passage of the McCarran Act (March 9, 1945), 15 U. S. C. 1011:

> * * * The Congress hereby declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest and that silence on the part of a Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.
>
> * * *
>
> Sec. 2(a) The business of insurance and every person engaged therein shall be subject to the laws of the several states which relate to the regulation or taxation of such business.

In commenting on the effect of this Federal statute on state law the Court in the *Prudential case, supra*, said:

> Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it "shall be subject to" the laws of the several states in these respects.
>
> Moreover in taking this action Congress must have had full knowledge of the nationwide existence of state systems of regulation and taxation; of the fact

The Legislature of South Carolina has said that the public health and public welfare are best served by having embalming done and funerals conducted by licensed embalmers and directors. It has also said that the public interest requires that these persons should not own or act as agents for the life insurance companies.[1]

III

The challenged statute is a valid exercise of the police power of the State.

A. The public policy of South Carolina is against funeral benefit insurance.

When the insurance laws of South Carolina were rewritten by the Legislature in its 1947 Session, Section 65 (Acts of 1947, 350) retained a law dating back to 1929, which made it unlawful for any insurance company to make payment or settlement of policies in merchandise or services and providing severe penalties for the violation of these provisions. Code 1942, Sec. 7984, 36 Stat. 234. The original statute provided for a penalty in the nature of a fine against the company only but in 1942 this law was amended to punish by fine or imprisonment the officers, agents or servants of the company. Appendix 34.

The Appellee J. G. Floyd was active in retaining in the new insurance code the provision outlawing payment in

[1] South Carolina is not alone in seeking to regulate the relationship between life insurance companies and funeral homes. See Florida Code Anno., § 638.16; Burns Indiana Stat. Anno. 1933, Ch. 63, § 727(d); Wis. Laws 1933, Ch. 187, § 156.12; Tenn. Code 1932, § 7151(1). (held invalid in *State v. Smith*, 164 Tenn. 199; 46 S. W. 2d 814, on the ground of the inadequacy of the caption). Cf. Mo. Laws 1945, § 6028; Kan. Laws 1945, Ch. 256, p. 447.

Similar statutes are in effect in other states. Fla. Code § 639.02; Ga. Code 56-9923; Ill. Rev. Stat. 1941, Ch. 73, § 956; Kentucky Rev. Stat. 1948, § 303.120, 303.121. Maine Rev. Stat. 1944, Vol. I, Ch. 56, § 138; Maryland Ann. Code 1939, Art. 48(a), § 110; N. C. Acts 1945, Ch. 377, § 58-33.1. Cf. Deering's Cal. Codes, Insurance § 10114; Mo. Rev. Stat. 1939, § 5454.

services of merchandise. He stated to the Senate Committee that he was opposed to that type of insurance and would fight it as long as he could (R. 107, 32). Yet here he attacks the constitutionality of a statute which outlaws burial insurance which pays off in cash but which is sold by undertakers at undertaking homes and is paid to the beneficiary through undertakers.

In the twenty years that the present law prohibiting payment in merchandise has been on the statute books its constitutionality has never been questioned. Certainly if the state can properly outlaw the payment of insurance policies in (funeral) services, it can properly and constitutionally prevent its evasion by the subterfuge of having the policy paid in cash but paid by the undertaker, who has collected the premiums at his place of business and who is also the insurance agent. The Legislature can prohibit the doing by indirection of things which it can prohibit directly.

In *Robbins v. Hennessey*, 86 Ohio State Rep. 181, 99 N. E. 319, the Court in upholding an Ohio statute making it unlawful for any insurance company engaged in the business of providing for payment of funeral, burial or other expenses, to pay or contract to pay benefits to any official or designated undertaker so as to deprive representatives of the deceased from procuring such services in the open market, used the following pertinent language:

> Whatever may have been the abuses against which the provisions of this act were directed, it clearly appears from the Act itself that the General Assembly of Ohio considered these contracts to be in restraint of trade and therefore against public policy and sought to prevent the making of all such contracts except as they might be expressly authorized by statute. . . . While Section 289 as amended was undoubtedly intended to correct abuses that had flourished under existing burial associations that desig-

nated directly in their contracts the undertaker or undertaking concern that should furnish the funeral and funeral outfit for the insured, yet in doing this the Legislature sought to make certain that the objects of the statute should not be defeated by any subterfuge or evasion.[2]

The facts in the instant case show that the Floyds acquired a pre-1939 insurance charter (Capital requirements were increased to $100,000.00 in that year. Code 1942, 7947, 7967), kept it dormant through 1947, came to the Legislature in 1947 to urge successfully a prohibition against insurance payable in (funeral) services (1947 Acts, 350), and in March 1948 began to push the sales by funeral directors of insurance policies under this old charter. Will a Court of Equity listen favorably to his complaint that the Legislature of South Carolina, having outlawed "direct" burial insurance as urged by them, went further and outlawed "indirect" burial insurance?

B. The Statute does not violate the Due Process or Equal Protection Clauses of the Federal Constitution.

Keeping in mind the public policy of the state prohibiting payment of insurance policies in merchandise or services, we think the challenged statute is aimed at a real evil.

It is true that the policies issued by the Appellee insurance company are payable to a stated beneficiary and that there is no contractual obligation requiring that the undertaker who was the agent writing the policy must take care of the funeral. It is significant, however, that the policy is enclosed in a jacket envelope. On this jacket envelope is printed in large red capital letters: "Guaranteed Pro-

[2] Laws prohibiting payment to designated undertakers are found in: Fla. Code § 639.01; Ga. Code 56-9920; Ill. Rev. Stat. 1941, Ch. 73, § 956; Maryland Ann. Code 1939, Art. 48(a), § 110; New York Code (McKinney), Insurance § 165; Ohio Ann. Code, 1940, § 666. Cf. Mo. Rev. Stat. 1939, § 5454.

tection for Prepayment of Funeral Expenses of", followed by a blank for the name of the insured. When the policy is written by an undertaker, the name of this undertaker is typewritten on this jacket envelope with a statement that the premium payments are due each month and payable to the undertaker (R. 23, 27, 37-39).

At the bottom of this jacket envelope is also printed in large capitals: "The Family Security Life Insurance Company is owned and operated by South Carolina Funeral Directors for the People of South Carolina." (R. 37.) On the face of the policy is a "Facility of Payment" clause which clearly justifies the insurer in paying the proceeds of the policy to the undertaker conducting the funeral. This clause provides that the Company may make payment to certain named relatives "or to any other person who may appear to be equitably entitled to such payment by reason of having incurred expense on behalf of the insured." (R. 18A.) It is difficult to reconcile the statement of the majority opinion in the District Court that this clause does not justify the insurer in paying the proceeds to the undertaker conducting the funeral. (R. 141.) We submit that the statute plugs a loophole and prevents a subtle evasion of the state law prohibiting the payment of life insurance policies in merchandise or services.

Some of the affidavits show that Mr. Floyd in his campaign to secure undertakers as agents for his company stated that this insurance would be a means of confining the undertaking business in South Carolina to the undertakers who are Floyd's agents and that it would be used as a means of discouraging other men, particularly veterans, from embarking upon this business. (R. 23, 28, 29.) There was also evidence that such a result had been brought about in some states, notably Alabama. (R. 23-4, 25, 30.

22. [illegible] At a national meeting of morticians a proponent of the [illegible] plan admitted that the benefits arising under it accrued to the morticians and not the insured. (R. 35.)

There are other compelling reasons why the statute is valid. The life insurance agent acts in certain aspects for both parties, the insurer and the insured, and life insurance companies are stressing the rôle of the agent as a counselor to the insured. *LaFourette v. McMaster*, 248 U. S. 465, 467, 468. The undertaker-agent receives for his services in collecting the premiums fifteen per cent. Since the premiums collected are very small this is a trifling consideration and he is tempted to secure his real remuneration out of profits on the funeral. In one specimen policy the monthly payment premium is $1.37, so that the undertaker-agent would receive less than twenty-five cents a month for collecting the premium. The undertaker-agent writing the policy knows, of course, the amount of the insurance. This presents a strong temptation to charge for the funeral the full amount of insurance even where the insured is a person of very scant means. This policy is one type of industrial insurance. The policies will be written in small amounts usually for people of limited economic substance and little business experience; people who in time of distress are easily persuaded to spend too much for the funeral of a dead relative.

The argument is made that the State of South Carolina has chartered the appellee insurance company and licensed its agents and that therefore they have some sort of a vested right to continue in the business which the state granted them the right to pursue.[1] But all corporate

[1] Compare the statement in *Queenside Realty v. Sack*, 328 U. S. 83, that "in no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws."

charters in South Carolina are subject to legislative amendment or repeal. Art. IX, Sec. 2 of the State Constitution of 1895 specifically provides that corporate charters may be altered or repealed, and Sec. 17 of the same Article provides that all corporations shall hold their charters or franchises subject to the provisions of this Constitution. Since 1841 the General Assembly of the State has reserved the power to alter, amend or repeal all corporate charters. Code of 1942, Sec. 7676. The validity of this statute was upheld in an early decision of this Court, *Tomlinson v. Jessup*, 82 U. S. 454:

> The object of the reservation and of similar reservations in other charters is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the state control over its contracts with the corporators which without that provision would be irrepealable and protected from any measures protecting its obligation.

Appellees assert that the statute violates the Equal Protection Clause in that Family Security is the only insurance company in the state to which the statute applies and that the statute was passed for the specific purpose of putting that company out of business. The Fourteenth Amendment does not forbid merely because a statute affects one group differently from others. *Kotch v. River Port Pilot Comrs.*, 330 U. S. 552; *Tigner v. Texas*, 310 U. S. 141; *Federal Hospital v. Cass*, 326 U. S. 207.

A casual reading of the statute, however, shows that it is of general application. It applies to all undertakers and to all life insurance companies or their agents. If the appellee company is allowed to continue operation and is successful, other companies will undoubtedly be attracted

to this field. In fact, the Court below states that this Company has no copyright on this type of insurance and that many other insurance companies already write it. (R. 142.) All that South Carolina says is that there shall be no tie-up between the company which writes the insurance and the undertaker who performs the funeral. As Judge Dobie says in his dissent (R. 172-3):

> If a state has the right to regulate race tracks certainly a statute directed at all race tracks would not be invalid merely by virtue of the fact that at the time of the enactment of the statute there was only one race track within the state.

C. Liggett Co. v. Baldridge does not compel a holding that the statute is invalid.

The Court below relied largely on two cases, *Liggett Co. v. Baldridge*, 278 U.S. 105, and *Hauser v. North British & Mercantile Insurance Co.*, 206 N.Y. 455, 100 N.E. 52. In the *Hauser case* the New York statute limited the insurance business solely to those principally engaged in that business and to real estate agents, barring all others, however well qualified. It may be distinguished on the ground that the statute was unduly restrictive and that no real relation to the public welfare was shown. Another distinction is that there a state was passing on the validity of its own statute, while here a Federal Court is considering a state statute which has not been tested in the state courts.

The Court below states that the reasoning of this Court in the *Liggett case* "seems conclusive against the validity of the instant statute" and that "the defendants assume that the *Liggett case* if followed by this Court would require the granting of plaintiff's prayer." (R. 143.) We disagree with both statements. That case involved a Pennsylvania statute requiring every drugstore to be owned (not merely

operated) by a licensed pharmacist, and the attack on the statute was made by a foreign corporation authorized to do business in Pennsylvania. The majority opinion stressed the fact that the statute was aimed at ownership and that in view of the existence of other Pennsylvania laws prohibiting unlicensed pharmacists, impure drugs, etc., the challenged statute had no reasonable relation to the public health and therefore violated the due process clause. In the case at bar the insurance company is owned, directed and dominated by one undertaking family. It uses undertakers as agents, collectors and paymasters. It boldly sells "Burial Protection" and "Prepaid Funerals" through these undertakers. It advertises its ownership by undertakers and recommends these funeral directors as worthy of fiduciary trust even though their pocketbook interest as morticians may be in conflict with the advice the family of an assured expects from an insurance agent at the time of bereavement (R. 39, 37). Here there is much more involved than mere ownership of stock.

Assuming however that the instant case were controlled by the *Liggett case*, we are not convinced that it would be followed today. A check in the citator indicates that the Court has not cited it since 1932. In a strong dissent, in which Mr. Justice Brandeis joined, Mr. Justice Holmes said:

> The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned Act has a manifest tendency to cure or at least to make the evil less. It has been recognized by the professions, by statutes and by decisions that a corporation offering professional services is not placed beyond legislative control by the fact that all the services in question are rendered by qualified members of the profession. (Citing cases.) But for decisions to which I bow I should not

think any conciliatory phrase necessary to justify what seems to me one of the instruments of legislative power. I think, however, that the police power, as that term has been defined and explained, clearly extends to a law like this, whatever I may think of its wisdom, and that the decree should be affirmed.

In applying the Fourteenth Amendment, the Court should consider its historical origin and its purposes, as well as the language itself. The primary purpose was to secure to the negro his civil rights.[5] In fact, Mr. Justice Miller, referring to the equal protection clause, said: "We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."[6]

Time proved that Mr. Justice Miller was a poor prophet, but in recent years this Court has shown a tendency to uphold state statutes involving business regulation where the sole attack is under the Fourteenth Amendment. The dissents of Justices Holmes and Brandeis have frequently become the rationale of the majority in cases where this Court has given wide latitude to State Legislatures for experimental legislation in economic and social fields, stressing the idea that questions of policy are for the Legislature and not for the Courts, and that the Court must

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[5] *Strauder v. West Virginia*, 100 U. S. 303; *Shelley v. Kraemer*, 92 L. Ed. Adv. 845.

[6] Slaughter-House Cases, 16 Wall. 36, 81, 21 L. Ed. 394, 410.

[7] "I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the 14th Amendment in cutting down what I believe to be the constitutional rights of the states. As the decisions now stand I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions. * * * We ought to remember the great caution shown by the constitution in limiting the power of the states and should be slow to construe the clause in the 14th Amendment as committing to the Court, with no guide but the court's own discretion, the validity of whatever laws the states may pass." Mr. Justice Holmes, dissenting in *Baldwin v. Missouri*, 281 U. S. 586, 595.

not strike down a state statute merely because it thinks the legislation unwise or because it is not the best remedy for the apparent evil." *Powell v. Pennsylvania*, 127 U.S. 678; *Carolene Products v. U.S.*, 323 U.S. 19; *Sage Stores v. Kansas*, 323 U.S. 32; *Nebbia v. N.Y.*, 291 U.S. 502; *Carmichael v. So. Coal & Coke*, 301 U.S. 495; *O'Gorman & Young v. Hartford F. Ins. Co.*, 282 U.S. 271; *Asbury Hosp. v. Cass*, 326 U.S. 207; *Queenside Realty v. Saxl*, 328 U.S. 80; *Kotch v. River Port Pilot Comrs.*, 330 U.S. 552; *West Coast Hotel Co. v. Parrish*, 300 U.S. 379.

> A State Legislature in the enactment of laws has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record, Courts cannot assume that its action is capricious or that with its informed acquaintance with local conditions to which the legislation is to be applied it was not aware of facts which afford reasonable basis for its action.
>
> *Carmichael v. So. Coal & Coke*, 301 U.S. 495, 510.

Where (as here) one of the contracting parties (the insured) is deemed by the Legislature to be the weaker of the two, the power to regulate is particularly broad. See *Advance-Rumely Thresher Co. v. Jackson*, 287 U.S. 283.

This Court has had occasion to point out the role of the District Court in suits of this nature. In *Mayo v. Lakeland Highlands*, 309 U.S. 310:

> The Legislation requiring the convening of a court of three Judges in cases such as this was intended to insure that the enforcement of a challenged statute should not be suspended by injunction except upon a clear and persuasive showing of unconstitutionality

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See Palmer, Dissents and Overrulings, 34 ABA Journal, 554, 556-7; Analysis of Dissents, 34 ABA Journal 677, 680-1.

> and irreparable injury. Congress intended that in this type of suits a prompt hearing and decision shall be afforded the parties so that the state shall be put to the least possible inconvenience in the administration of their laws.

And in the same case in a separate opinion, Mr. Justice Frankfurter warned:

> We ought not to encourage the use of the judicial process for such unjustifiable attempts to set aside a state law by allowing them to be successful in result even though legally erroneous. We ought to apply what was characterized in *Massachusetts State Grange v. Benton*, 272 U. S. 525, 71 L. Ed. 387, 390, 47 S. Ct. 189, as "the important rule, which we desire to emphasize, that no injunction ought to issue against officers of a state clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury." Even if the present bill is taken at face value, it does not make out "a case reasonably free from doubt." The withdrawal of the injunction from industrial controversies made by the Norris-LaGuardia Act was in no small part due to the belief by Congress that experience had shown that the use of a legal remedy devised for a simple situation might in a totally different environment become a perversion of that remedy. Congress has also given indication in Section 266 of the Judicial Code (28 USCA 380) of its concern over the misuse of the injunction fashioned for settling an ordinary clash of private interests, to restrain the machinery of a state in carrying out some vital state policy.

Yet it was the District Court's conclusion that the legislation was unwise and unnecessary that led to the erroneous decision. The desirability of issuing burial insurance policies (Findings 15-17), the actuarial soundness of the Family Security Plan (Findings 20-23), the sufficiency

of the South Carolina "Insurance Law" of 1947 to adequately protect policy holders (Findings 25-29), the fact that the challenged legislation was advocated by competing insurance men and undertakers (Findings 33, 37-41), are the things which persuaded the Court below to strike down this statute as denying equal protection and due process. (R. 152-165.)

These are not relevant considerations for the Court. They are all factors to be considered by the Legislature, to whom our Constitution entrusts decisions involving the wisdom of laws. When a Court finds that the state has the power to pass the law its function ceases. Here the Federal District Court invaded the province of the South Carolina Legislature. Such a usurpation of power undermines not only our Federal system of division of power between State and Nation but also strikes at the principle of separation of powers among legislative, judicial and executive branches.

The Fourteenth Amendment was not incorporated into the Constitution to destroy our Federal system. Yet, carried to its logical conclusion, that is the result of the District Court decision. If a state has no power to alter the powers of its own corporations, though that power has been reserved, if a state has no power to regulate insurance and undertaking by non-discriminatory legislation, there are no rights left to a state. We do not believe that such was the intended effect of the Fourteenth Amendment.

IV

The Court Will Not Consider Constitutional Questions Not Required by the Record.

It is to be noted that the District Court's opinion, pointing to the absence of a separability clause in the South

Carolina statute, concludes that if the Act is unconstitutional in any respect it is within the province of the District Court to declare it invalid in its entirety. (R. 139.)

This conclusion overlooks the fact that the only function of a court is to decide justiciable controversies. No matter how unconstitutional a statute may be a Court cannot strike it down until some litigant aggrieved by its unconstitutional provisions presents a case within the jurisdiction of a Court which requires a decision on the Constitutional issue: *Ashury Hosp. v. Cass*, 326 U.S. 207, 213; *Alabama v. McAdory*, 325 U.S. 450.

Here the Appellees Floyd, both undertakers, own a controlling interest in the Appellee, Family Life, an insurance company all of whose stockholders, directors and officers, save one, are undertakers. The majority of the Company's agents are morticians or their employees. Policies are written by morticians, premiums are paid to them at the funeral parlor, and benefits are paid through them. The sole issue is whether the statute prohibiting these business arrangements deprives these Appellees of due process or equal protection.

We have no issue of whether an insurance officer could own a minority interest in a mortuary. We have no issue as to whether a part-time driver of a hearse might sell insurance. We believe the state can prohibit even these relationships. But if in a proper case a Court would say that the legislature could not forbid these things, it does not avail the Appellees who are not injured by these features of the Act.

CONCLUSION

The United States, a Government of limited powers, can require a public utility holding company to divest itself

of its operating companies, *American Power & Light Co. v. SEC*, 329 U. S. 90; *North American Co. v. SEC*, 327 U.S. 686; it can require a motion picture chain to divest itself of some of its theaters, *Schine Chain Theaters v. U. S.*, 92 L.Ed. Adv. 871, prohibit a railroad company from mining the coal it carries, *U. S. v. Delaware & Hudson*, 213 U.S. 366, or an investment banker from acting as broker, 15 USC Sec. 10. *A fortiori* South Carolina, with broad powers reserved to it by the Tenth Amendment, can order the dissolution of all ties between the business of insurance and that of undertaking where, as here, the legislation bears a reasonable relation to the public good.

The judgment should be reversed and the Complaint dismissed.

Respectfully submitted,

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December, 1948.

APPENDIX

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South Carolina Acts of 1948, page 1947:

No. 787

AN ACT Making It Unlawful For Any Life Insurance Company, Its Officers, Agents Or Employees To Own, Operate Or Maintain A Funeral Or Undertaking Business; Or Contract, Or Agree With Any Funeral Or Undertaking Establishment To Conduct The Funeral Of Any Person Insured By Such Insurance Company; Or For Any Funeral Or Undertaking Establishment, Its Agents, Officers, Or Employees To Be Licensed As Agent, Salesman Or Solicitor For Any Life Insurance Company Doing Business In This State.

BE IT ENACTED by the General Assembly of the State of South Carolina:

SECTION 1: Life insurance companies and their employees not Own or operate undertaking business.—It shall be unlawful for any life insurance company, corporation, or association, except fraternal benefit societies licensed to do business in this State to own, manage, supervise, or operate or maintain a mortuary or undertaking establishment, or to permit its officers, agents or employees to own, operate or maintain any such funeral or undertaking business.

SECTION 2: Life insurance company or sick or funeral benefit company not contract with undertaker conduct funeral of person insured by it.—It shall be unlawful for any life insurance company, sick or funeral benefit company, or any company, corporation or association engaged in a similar business to contract or agree with any funeral director, undertaker or mortuary to the effect that such funeral director, undertaker, or mortuary shall conduct the funeral of any person insured by such company, corporation or association.

SECTION 3: Undertaker and his employees not act as agent for life insurance company.—It shall be unlawful for any funeral director, undertaker, or mortuary, or any agent, officer or employee thereof to be licensed as agent, solicitor or salesman for any life insurance company, corporation or association doing business in this State.

SECTION 4: Penalties.—Any person violating any of the provisions of this Act shall be deemed guilty of a misdemeanor, and each violation thereof shall be a separate offense, and upon conviction shall be punished by fine not exceeding One Thousand ($1000.00) Dollars or by imprisonment at hard labor for not exceeding six (6) months, or both such fine and imprisonment within the discretion of the courts.

SECTION 5: Repeal.—All Acts or parts of Acts inconsistent with this Act are hereby repealed.

SECTION 6: Time Effective.—This Act shall take effect upon its approval by the Governor.

Approved the 14 day of April, 1948.

Code of 1942, Section 7984:

§ 7984. **Penalties pay insurance in merchandise or services.**—It shall be unlawful for any insurance company, fraternal organization, burial association, or any other association to make payment or settlement of policies written by such companies or associations in merchandise or services rendered or agreed to be rendered, or to issue any policy, providing for settlement in merchandise or services rendered or to be rendered. Any insurance company, fraternal organization, burial association or any other association violating the provisions of this section shall be liable to a penalty of ten (10) times the amount of such policy, certificate or other evidence of insurance to be collected

in a suit by the heirs-at-law of such deceased policyholder. Any officers, agents or servants of any insurance company, fraternal organization, burial association, or any other association, violating the provisions of this section shall be guilty of a misdemeanor and shall be punished by a fine of not less than one hundred ($100.00) Dollars nor more than one thousand ($1000.00) dollars, or suffer imprisonment on the county chaingang or in the state penitentiary for a period of not less than thirty (30) days nor more than one (1) year in the discretion of the Court.

(Acts 1929 (36) 234; 1940 (41) 1672; 1941 (42) 286).

Acts of 1947, page 350:

SECTION 65: Not to Pay Death Benefits in Services—not issue policy providing for settlement of benefits in merchandise or services—Penalty.—It shall be unlawful for any insurance company to make payment or settlement of death benefits under policies written by such companies in merchandise or services rendered or agreed to be rendered or to issue any policy which provides for settlement in merchandise or services rendered or to be rendered. Any insurance company violating the provisions of this section shall be liable to a penalty of ten (10) times the amount of such policy, certificate or other evidence of insurance to be collected in a suit by the heirs-at-law of such deceased policyholder. Any officers, agents or servants of any insurance company violating the provisions of this section shall be guilty of a misdemeanor and shall be punished by a fine of not more than one thousand ($1,000.00) dollars, or suffer imprisonment on the county chaingang or in the state penitentiary for a period of not more than one (1) year in the discretion of the court.

South Carolina Constitution of 1895, Art. IX:

Section 2. Charter of incorporation.—No charter of incorporation shall be granted, changed or amended by special law, except in the case of such charitable, educational, penal or reformatory corporation as may be under the control of the State, or may be provided for in this Constitution, but the General Assembly shall provide by general laws for changing or amending existing charters, and for the organization of all corporations hereinafter to be created, and any such law so passed, as well as all charters now existing or hereafter created, shall be subject to future repeal or alteration: *Provided*, That the General Assembly may by a two-thirds vote of each House on a concurrent resolution allow a Bill for a special charter to be introduced, and when so introduced may pass the same as other Bills.

(See Const. 1868, IX; 9; XII, 1.)

* * *

Section 17. Laws for benefit of corporation passed only on conditions.—The General Assembly shall never remit the forfeiture of the franchise of any corporation now chartered, nor alter nor amend the charter thereof, nor pass any general or special law for the benefit of such corporation, except upon the condition that such corporation shall thereafter hold its charter and franchise subject to the provisions of this Constitution, and the acceptance by any corporation of any provision of any such laws or the taking of any benefit or advantage from the same shall be conclusively held an agreement by such corporation to hold its charter and franchise under the provisions of this Article.

Code of 1942, Section 7676:

§ 7676. All charters subject to amendment or repeal.—It shall be deemed a part of the charter of every

corporation created under the provisions of any general law, and of every charter granted, renewed, or amended by act or joint resolution of the General Assembly (unless such act or joint resolution shall, in express terms, declare the contrary), that such charter, and every amendment and renewal thereof, shall always remain subject to amendment, alteration or repeal by the General Assembly.

(Acts 1886 (19) 546.)